STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2009
v	No. 284128 Macomb Circuit Court
MICHAEL STEVEN PATINO, Defendant-Appellant.	LC No. 2007-003634-FC

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct involving penetration, MCL 750.520b(1)(a) (person under 13), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13). Defendant was sentenced to 25 to 60 years for first-degree criminal sexual conduct involving penetration, and 10 to 22 ½ years' imprisonment for each of the second-degree criminal sexual conduct convictions. For the reasons set forth in this opinion, we affirm.

Defendant's step-daughter informed her mother that defendant had touched her in "her private parts" while the complainant's mother was at work. Immediately after being informed of this, complainant's mother telephoned the police who arrived at the residence and arrested defendant. Thereafter, police took defendant to the station house where he was read his *Miranda*[1] warnings and signed an initial statement indicating that the complainant had acted in a sexually aggressive manner toward him. After signing his first statement, police officers pretended to receive a call from the State Police crime lab indicating that defendant's DNA was "all over the [complainant]" and that he would have to explain how that occurred. Thereafter defendant made a second statement where he admitted to rubbing his penis on the vagina of the complainant. Defendant was convicted of the charges listed above and contends on appeal that trial counsel was ineffective for failing to suppress his statement to police and that he is entitled to resentencing.

I.

[1] 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to file a motion to suppress or request a *Walker* hearing regarding defendants statements to police officers. See *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant filed a motion to remand with this Court requesting a *Ginther* hearing to develop the factual basis of his claim on appeal. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court denied defendant's motion to remand, and therefore, review of defendant's ineffective assistance of counsel claim is limited to the facts contained in the record. *Jordan*, *supra* at 667.

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense" and thus there is a reasonable probability that but for that deficient performance, the result of the trial would have been different. *Riley*, *supra* at 140; *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). "[T]o demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Riley*, *supra* at 140 (citations omitted). Counsel's performance should not be assessed with the benefit of hindsight. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Thus, the Sixth Amendment guarantees a range of reasonably competent advice and a reliable result. It does not guarantee infallible counsel." *People v Mitchell*, 454 Mich 145, 170-171; 560 NW2d 600 (1997); see, also, *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Counsel is not ineffective for failing "to advocate a meritless position."" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *Matuszak*, *supra* at 58.

Defendant argues that because police officers unlawfully arrested him in his home, his subsequent statements to city of Warren Police Department Detectives Pierce and Marsee should be excluded as the fruit of defendant's unlawful arrest.

This Court, in *People v Reese*, 281 Mich App 290, 294-295; 761 NW2d 405 (2008), discussed Michigan arrest protocol as follows:

> Both the United States Constitution and the Michigan Constitution protect persons against unreasonable searches and seizures. . . . In order to lawfully arrest a person without a warrant, a police officer must "possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." [Citing *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); see, also, *People v Tierney*, 266 Mich App 687, 705; 703 NW2d 204 (2005).]

"In reviewing a challenge to probable cause, this Court "must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *Tierney*, *supra* at 705. "[I]t is well established that an arrest of a defendant without a warrant in his private residence is illegal unless the circumstances surrounding that arrest are exigent."

People v Snider, 239 Mich App 393, 413-414; 608 NW2d 502 (2000) (citing *Payton v New York*, 445 US 573, 100 S Ct 1371; 63 L Ed 2d 639 (1980)). "Exigent circumstances [to arrest a suspect without a warrant] are present where immediate action is necessary to: (1) protect the police officers or other persons, (2) prevent the loss or destruction of evidence, or (3) prevent the escape of the suspect." *People v Love*, 156 Mich App 568, 570-571; 402 NW2d 9 (1986).

In this case, City of Warren police officers arrived at defendant's house in response to a 911 call placed by defendant's oldest step-daughter. Defendant's then wife, and the complainant's mother, met the officers outside and informed them that the six-year-old complainant told her that "[defendant] had been touching her in bad ways," and that the complainant rubbed her own vaginal area when Patino asked her to demonstrate what defendant had done. According to the mother's testimony, a confrontation ensued between her, defendant, and the complainant. Defendant called the complainant a liar. The complainant insisted that she was not lying, and defendant told complainant's mother that the complainant was the one who had touched him in inappropriate ways.

Based on the information provided by complainant and her mother, police officers had sufficient knowledge that defendant could be a threat to the complainant and other children in their household pending the issuance of an arrest warrant. Police officers at the scene were also aware that defendant could have destroyed valuable DNA evidence or fled to another location. All of these factors constitute exigent circumstances sufficient to justify defendant's arrest without a warrant. *Love*, *supra.*

Moreover, even if defendant's arrest was unlawful, this Court, in *People v Kelly*, 231 Mich App 627, 634; 588 NW2d 480 (1998), discussed the suppression of a confession given after an unlawful arrest as follows:

> The mere fact of an illegal arrest "does not per se require the suppression of a subsequent confession." It is only when an "unlawful detention has been employed as a tool to directly procure *any* type of evidence from a detainee" that the evidence is suppressed under the exclusionary rule. Intervening circumstances can break the causal chain between the unlawful arrest and inculpatory statements, rendering the confession "'sufficiently an act of free will to purge the primary taint'" of the unlawful arrest. [Citations omitted.]

Our review of the record reveals that, at trial during a brief recess, defense counsel expressly stated that he was not seeking a *Walker* hearing regarding defendant's statements to the police, as a matter of trial strategy. Defense counsel's performance did not fall below an objective standard of reasonableness because his decision to forego a prospectively unsuccessful *Walker* hearing constituted sound trial strategy. Defense counsel stated that he assessed the probability of success on the motion to suppress defendant's statements, and "certainly could have argued, [but] probably would not have succeeded and [defendant's statement would have come in anyway." Moreover, defense counsel clearly stated that it sought to persuade the jury that defendant was coerced into making his statement to Detectives Pierce and Marsee, rather than arguing a meritless motion to suppress. Therefore, a motion to suppress defendant's subsequent statement to police officers, on the basis of defendant's unlawful arrest, would have been futile.

Defendant next contends that his statements were coerced such that his *Miranda* waiver was not knowingly or voluntarily made. Review of the record reveals no factual basis for defendant's contention. "In general, statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US at 444. In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Michigan Supreme Court set forth the following non-exhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [See, also, *People v Snider*, 239 Mich App 393, 417-418; 608 NW2d 502 (2000).]

Before interrogation began, Detective Pierce read defendant his Constitutional rights and provided him with a typewritten copy so he could read along while the officers explained them to him. Defendant initialed next to each right as an acknowledgment that he understood each one. Defendant confirmed that he could read and write the English language, and that he was not under the influence of alcohol or drugs. Defendant and Detective Pierce both signed the form and defendant voluntarily agreed to answer questions. Detective Pierce asked defendant if he understood the charges against him. Defendant replied that he was not sure. Detective Pierce went on to explain that the complainant alleged that he sexually penetrated her. Initially, defendant absolutely denied the charges, but explained that the complainant was sexually promiscuous, and he referenced certain incidents of the complainant coming on to him. Detectives Marsee and Pierce told defendant that he could write down what they had discussed if he wanted to. In his written statement, defendant described his version of what occurred between himself and the complainant. At trial, Detective Marsee read defendant's statement aloud, as follows:

> [The complainant] has tried many times to make me rub her vagina and I have pulled my hand away and said no. One time I was sleeping in the – and woke up with her holding my hand on her vagina and I told her to stop or told her no, stop. [The complainant] has also tried to sit on my lap and grind herself on me and I told her no, stop. Another time, when I was sleeping I woke up with her on top of me rubbing herself on me and I told her no, stop. Another time I came out of the shower with a towel and I [went] downstairs to get dressed. [The complainant sneaked] downstairs and saw me naked and I told her go away, I [was] getting dressed. She came back. When I had my boxers on [the complainant] put her hand through the hole, pulled out my penis and I told her no, stop. Another time [the complainant] sat on the edge of the bed, put her arms out and asked for a hug. When I gave her a hug she pulled me down with her arms around my neck and

her legs around my waist and asked me if we could have sex now and I pushed her off me and said no.

After defendant wrote down his statement, Detective Marsee left the interrogation room and did not return. Approximately 25 minutes later, Detective Pierce gave defendant a bathroom break and provided him with a bottle of water. After his break, defendant was placed in a room near Detective Pierce's desk awaiting a S.A.N.E. nurse to perform an examination on him. At this time, Detective Pierce was sitting at his desk. A phone in the office rang. Detective Pierce pretended it was his phone. He picked it up and began talking. After a couple of minutes, Detective Pierce hung up the phone, walked over to the room where defendant was sitting, and told him, "it's the Michigan State Police and your DNA is all over [the complainant's] vagina and you need to account for that." Defendant sat down, he began crying, and he said, "at one point [the complainant] asked him to rub his penis on her vagina and that it happened once and he felt really bad about it."

In response, to defendant's statement, Detective Pierce asked defendant to write down the incident as it occurred. Detective Pierce handed defendant another form, on which he wrote the following: "[The complainant] then continued to ask me to rub my penis on her vagina. I did for just a second and said no, this is wrong, and stopped. I feel very disgusted with myself now."

Detectives Marsee and Pierce both denied ever raising their voices, or threatening defendant with physical violence or a stringent term of incarceration, etc. Defendant was free to decide whether he wanted to put his statement in writing, but he chose to do so. Therefore, the evidence in the record supports the conclusion that defendant's statement to Detectives Marsee and Pierce was voluntary.

Furthermore, defendant does not "overcome a strong presumption that counsel's performance constituted sound trial strategy." *Riley*, *supra* at 140. Defense counsel theorized Detectives Pierce and Marsee, and complainant's mother had manipulated defendant. Through Detectives Pierce's and Marsee's testimony, defense counsel established that it is constitutionally permissible to elicit testimony from a suspect on the basis of false or misleading information. Detective Pierce testified that he told defendant that the laboratory results revealed defendant's DNA all over the complainant's vagina because he had a "gut feeling" that defendant's initial statement was incomplete. Detective Pierce said, "[he] figured [that his interrogation strategy] was worth a try." Furthermore, defense counsel emphasized each detective's specific training to utilize certain techniques, at their discretion, in the course of interrogation.

Through her testimony, defense counsel sought to establish that complainant's mother had a motive to fabricate the charges against defendant. Defense counsel emphasized that she did not feel as though defendant was earnestly seeking employment. However, after defendant's arrest, she continued to drive defendant's car. Defense counsel argued that the complainant had been told what to say in her testimony. To attack the validity of the complainant's claim, defense counsel established that neither complainant's other children, nor her parents, ever mentioned that they had noticed anything suspicious going on between complainant and defendant.

Even assuming counsel's failure to bring a motion to suppress was defective, the complainant's testimony alone was sufficient to support defendant's convictions. A victim's

testimony "need not be corroborated in prosecutions [pursuant to MCL 750.520b through 750.520g]." MCL 750.520h; see also, *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). Based on our review of the record and defense counsel's stated trial strategy, defense counsel's performance was not seriously deficient and did not prejudice defendant, and accordingly did not violate defendant's Sixth Amendment right to the effective assistance of counsel.

II.

Defendant next argues that the trial court erred in sentencing defendant because defendant's January 26, 1989, stealing a financial transaction device conviction should have been "suppressed" pursuant to the ten-year gap rule. Defendant's February 15, 2000, driving with a suspended license conviction should not have been counted as a conviction pursuant to MCL 777.50 because misdemeanor traffic violations are not scored pursuant to prior record variable (PRV) five. Without the commission of defendant's driving with a suspended license conviction, defendant would have been conviction free for a period longer than ten years, and any convictions prior to that ten year period could not have been scored to determine prior record variables for sentencing guidelines. Consequently, there is a statutory conflict that should be resolved in favor of PRV-5, the more specific statute. Defendant's stealing a financial transaction device conviction should have been scored at zero instead of five points pursuant to PRV-2, which would have reduced defendant's PRV level from a "D" to a "C," and reduced the minimum sentence range from 108 to 225 to 81 to 168 months. Therefore, defendant contends this Court should remand defendant's case for resentencing.

The interpretation of statutory sentencing guidelines and the legal questions presented by application of the guidelines are subject to de novo review. However, this Court reviews the imposition of a sentence for an abuse of discretion. *People v Underwood*, 278 Mich App 334; 750 NW2d 612 (2008). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Under Michigan sentencing law, prior record variables are combined with offense variables to determine the recommended minimum sentence range for a given inmate. MCL 777.21. In this case, defendant received five points for prior record variable two (prior low severity felony convictions) (PRV-2), two points for prior record variable five (prior misdemeanor convictions or prior juvenile adjudications) (PRV-5), and 20 points for prior record variable seven (subsequent or concurrent felony convictions) (PRV-7). See MCL 777.52; MCL 777.55; MCL 777.57.

Defendant argues that PRV-2 was incorrectly scored at five points, and the definition of the term "conviction" under MCL 777.50 should exclude misdemeanor traffic convictions, such as his driving with a suspended license conviction. Notwithstanding defendant's argument, "[a] *conviction* refers to criminal charges to which the defendant pleads guilty or is found guilty in a court of law." *Reyna*, *supra*, 184 Mich App 632 (emphasis in original). Moreover, this Court, in *Reyna* held:

> [W]e do not believe that a conviction for purposes of determining the applicability of the ten-year rule need be a conviction for an offense which may be scored

> under the guidelines. Rather, *we hold that any criminal conviction is sufficient to establish that the defendant did not have a ten-year period free of convictions*. [Emphasis added.]

Therefore, defendant's prior record variables were properly scored pursuant to MCL 777.50 and 777.52. Even if the trial court had erred in scoring defendant's prior record variables, defendant's 25-year minimum sentence was mandated pursuant to MCL 750.520b(2)(b), discussed, *infra*.

In his brief, defendant concedes that the 25-year mandatory minimum sentence that he received for his first-degree criminal sexual conduct involving penetration (person under 13) conviction was not a "departure" from sentencing guidelines pursuant to MCL 750.520b(2)(b), which provides:

> Criminal sexual conduct in the first degree is a felony punishable . . . [f]or a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

Therefore, the trial court did not abuse its discretion in imposing the mandatory minimum sentence.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia D. Stephens